CANUCK LAW

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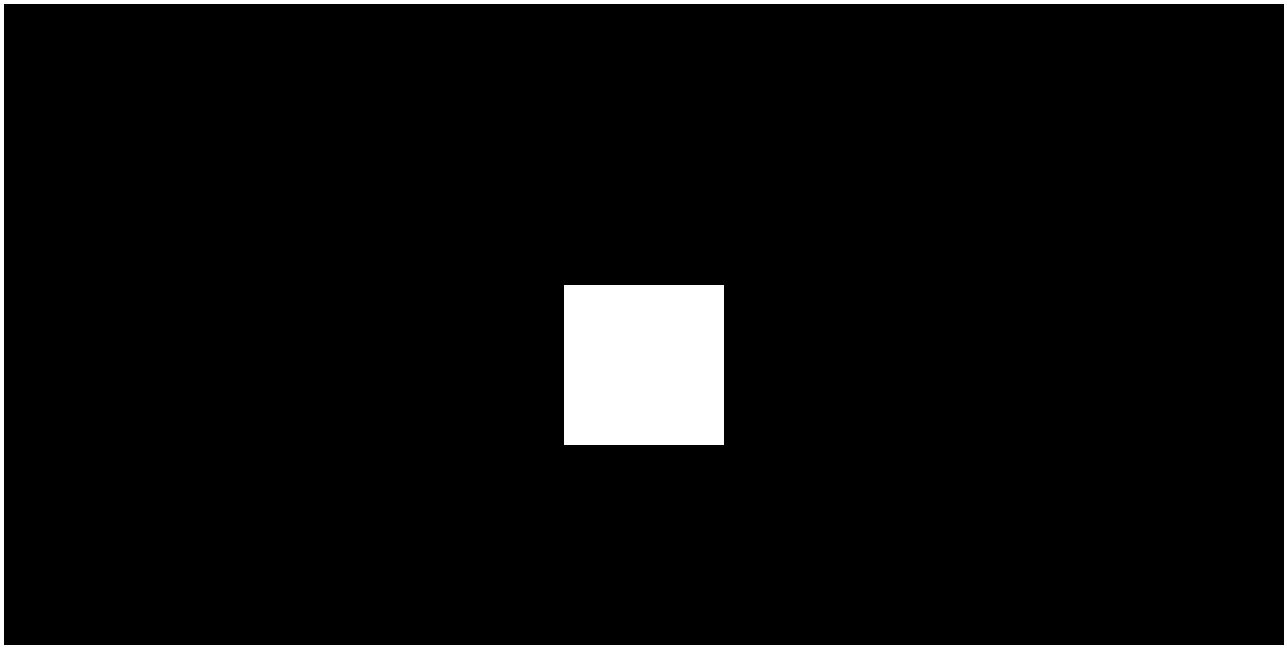
AUGUST 27, 2020 BY RONNIE

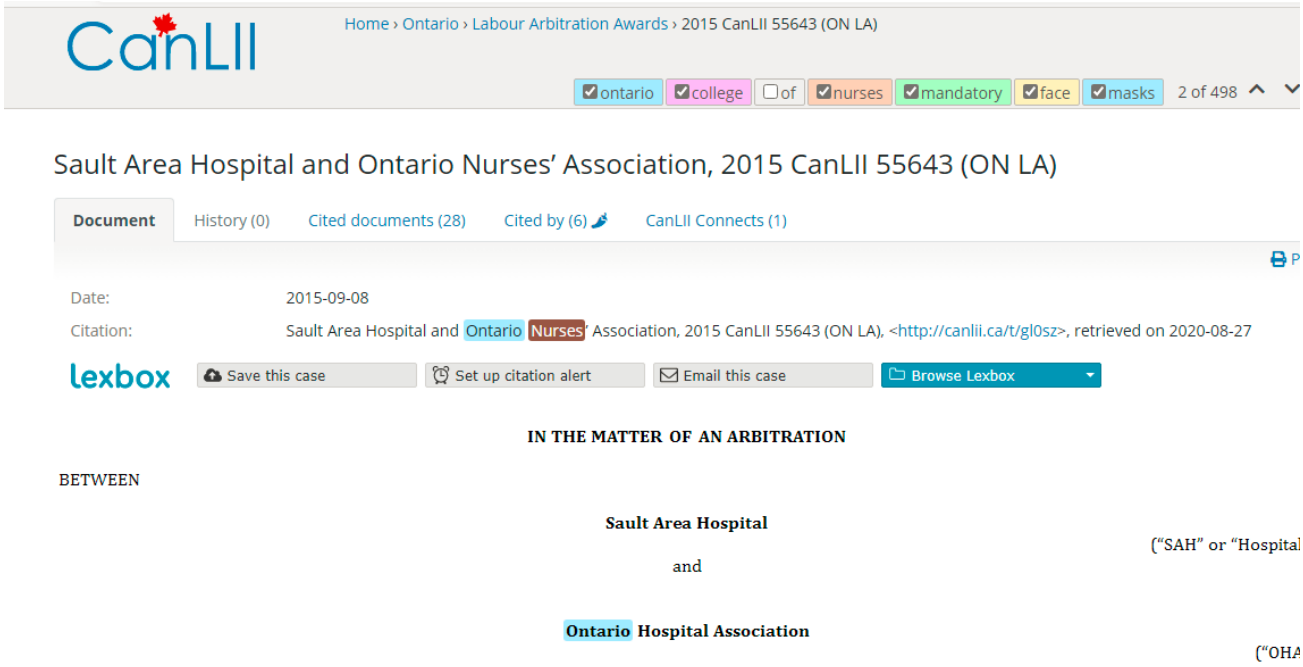
Vaxx Or Mask Rulings (2015, 2016 & 2018); Bonnie Henry Testifies; BC Ombudsman Report



There were 2 rulings in Ontario (2015 and 2018), which concerned the “vaccinate or mask” policy for health care workers. BCPHO Bonnie Henry testified in the 2015 case that there was very limited evidence to support masks. Also, the June 2020 BC Ombudsman report is interesting in terms of government overreach.

Keep in mind that Bonnie Henry also says there’s no science behind limiting groups to 50 people. (See 1:00 in above video). But she imposed that restriction anyway.

1. Sault Area Hospital (2015)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ontario college of nurses mandatory face masks 2 of 498

Sault Area Hospital and Ontario Nurses' Association, 2015 CanLII 55643 (ON LA)

Document History (0) Cited documents (28) Cited by (6) CanLII Connects (1)

Date: 2015-09-08

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IN THE MATTER OF AN ARBITRATION

BETWEEN

Sault Area Hospital

("SAH" or "Hospital

and

Ontario Hospital Association

("OHA

2015.ontario.nurses.association.mask.ruling

322. The ***assertion that a mask requirement serves a valuable or essential purpose, albeit that there is only "some" evidence, is also weakened by actual employer practice***. If the mask evidence were as supportive as claimed, it ***would suggest that vaccinated HCWs should also wear masks given the limited efficacy of the vaccine even in relatively 'good' years***. The SAH Chief of Medical Staff raised this question at the outset. The Hospital's failure to consider re-evaluating the Policy's application when the extent of the 2014-2015 vaccine mismatch became known raises the same issue. The OHA/SAH expert responses to these questions set out in full above[425] were short of satisfying.

323. Wearing a mask for an entire working shift, virtually everywhere, no matter the patient presenting circumstances, is most unpleasant. While I readily accept that the wearing of a mask for good reason may reasonably be expected of HCWs, an Irving "balancing of interests" is required. The Policy makes a significant 'ask' of unvaccinated employees; that is to wear an unpleasant mask for up to six months at a time. As noted, the evidence said to support the reason for the 'ask'—evidence concerning asymptomatic transmission and mask effectiveness–may be described at best as "some" and more accurately as "scant". ***I conclude that many of the articles footnoted in support of the strong opinions set out in the OHA/SAH expert Reports provide***

very limited or no assistance to those views. The required balancing does not favour the Policy.

Decision

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342. On the evidence before me, ***I find the VOM provisions of the SAH Policy to be unreasonable***. Accordingly, for all of the foregoing reasons, I declare SAH to be in breach of Article B-1 (e) of the ONA/SAH Local Agreement and Article 18.07 (c) of the ONA Central Agreement.

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343. Any question concerning the need, if any, for additional relief is remitted to the parties for their consideration. I remain seized of remedial issues.

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Dated at Toronto, this 8th day of September, 2015

It was found that there wasn't strong evidence that masking health care workers for months at a time actually had a proven effect. It was further undermined by inconsistent practices at the Sault Area Hospital.

2. Bonnie Henry Testifies In 2015 Case

https://www.canlii.org/en/on/onla/doc/2015/2015canlii62106/2015canlii62106.pdf
2015.ontario.nurses.association.mask.ruling

> 134. Dr. Henry agreed with this observation by Dr. Skowronski and Dr. Patrick who are her colleagues at the British Columbia Centre for Disease Control:
>
> .
>
> I do agree, as we've discussed earlier, influenza is mostly transmitted in the community and ***we don't have data on the difference between vaccinated and unvaccinated healthcare workers and individual transmission events…in healthcare settings***.
>
> .
>
> 135. ***Dr. Henry agreed that no VOM policy would influence influenza in the community***. Dr. McGeer denied that she had used or recommended the use of community burden in the assessment of development of such a policy.

So there is no data on any differences between vaccinated and unvaccinated health care workers. Yet these people are still arguing for VOM (vaccine or mask).

> 145. In her Report ***Dr. Henry also referred to observational studies as supporting the data she said was derived from the RCTs but acknowledged that these studies related to long term care and not acute care settings***. She was cross-examined at

length concerning the studies referenced in this section of her Report, some that dealt with other closed community settings, and agreed that they were “clearly not referring to a healthcare setting”.

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146. ***Witness commentary concerning the observational/experimental studies relied upon in the McGeer/Henry Reports is set out in Appendix A to this Award. I conclude from a review of these studies, and the expert witness commentary, that they do not disclose a consistent position***. They address a wide range of issues in a wide range of settings. Some are not supportive of the OHA/SAH experts’ claim. ***Some provide weak support at best. Some have nothing to do with the issue in question***. Some have acknowledged study design limitations.

Evidence introduced by Bonnie Henry was for long term care centers, not health care settings, so this apples and oranges. There is also weak or irrelevant evidence argued.

160. In direct examination Dr. Henry stated that the pre-symptomatic period was “clearly not the most infectious period but we do know that it happens”.[203] She also agreed in cross-examination that transmission ***required an element of proximity and a sufficient amount of live replicating virus***.

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161. At another point, the following series of ***questions and answers ensued during Dr. Henry’s cross-examination***:

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Q. With respect to transmission while asymptomatic, and I want to deal with your authorities with respect to that, would you agree with me that there is scant evidence to support that virus shedding of influenza actually leads to effective transmission of the disease before somebody becomes symptomatic?

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A. I think we talked about that yesterday, that there is some evidence that people shed prior to being symptomatic, and there is some evidence of transmission, that leading to transmission, but I absolutely agree that that is not the highest time when shedding and transmission can occur.

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Q. So were you—I put it to you that there’s scant evidence, and that was Dr. De Serres’ evidence, so—but that ***there’s very little evidence about that, do you agree***?

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A. There is—as we talked about yesterday, ***there is not a lot of evidence around these pieces, I agree***.
.
Q. And clearly transmission risk is greatest when you're symptomatic, when you're able to cough or sneeze?
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A. Transmission risk is greatest, as we've said, when you're symptomatic, especially in the first day or two of symptom onset

Not a lot of evidence regarding risks of transmission. Yes, this is 2015, but it coming straight from BCPHO Bonnie Henry.

177. Dr. McGeer and Dr. Henry presented the position of the OHA and the Hospital based upon their understanding of the ***relevant literature. Neither*** of them asserted that they had ***particular expertise with respect to masks or had conducted studies testing masks.***

So, no actual expertise of research. Bonnie Henry just read what was available. And this is the Provincial Health Officer of British Columbia.

184. In her pre-hearing Report Dr. Henry responded to a request that she discuss the evidence that masks protect patients from influenza this way:
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There is good evidence that surgical masks reduce the concentration of influenza virus expelled into the ambient air (a 3.4 fold overall reduction in a recent study) when they are worn by someone shedding influenza virus. There is also evidence that surgical masks reduce exposure to influenza in experimental conditions.
.
Clinical studies have also suggested that masks, in association with hand hygiene, may have some impact on decreasing transmission of influenza infection. ***These studies are not definitive as they all had limitations***. The household studies are limited by the fact that mask wearing did not start until influenza had been diagnosed and the patient/ household was enrolled in the study, such that influenza may have been transmitted prior to enrollment. A study in student residences is limited by the fact that participants wore

their mask for only approximately 5 hours per day. Two systematic reviews of the cumulative studies conclude that there is evidence to support that wearing of masks or respirators during illness protects others, ***and a very limited amount of data to support the use of masks or respirators to prevent becoming infected***

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In summary, there is evidence supporting the use of wearing of masks to reduce transmission of influenza from health care workers to patients. It is not conclusive, and not of the quality of evidence that supports influenza vaccination. ***Based on current evidence, patient safety would be best ensured by requiring healthcare providers to be vaccinated if they provide care during periods of influenza activity. However, if healthcare workers are unvaccinated, wearing masks almost certainly provides some degree of protection*** to their patients.

Bonnie Henry keeps hedging her answers. Yes, there is protection, but there are issues with the studies, and the evidence isn't conclusive. She also takes the position that vaccinating everyone in health care settings would be prefereable.

219. Dr. Henry answered the 'why not mask everyone' question this way:

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It is [influenza vaccination] by far, not perfect and it needs to be improved, but it reduces our risk from a hundred percent where we have no protection to somewhat lower. ***And there's nothing that I've found that shows there's an incremental benefit of adding a mask to that reduced risk…..there's no data that shows me that if we do our best to reduce that incremental risk, the risk of influenza, that adding a mask to that will provide any benefit***. But if we don't have any protection then there might be some benefit when we know our risk is greater.

.

When we look at individual strains circulating and what's happening, ***I think we need it to be consistent with the fact that there was nothing that gave us support that providing a mask to everybody all the time was going to give us any additional benefit over putting in place the other measures that we have for the policy***. It's a tough one. You know, it varies by season.[320]

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It is a challenging issue and we've wrestled with it. I'm not a huge fan of the masking piece. I think it was felt to be a reasonable alternative where there was a need to do—to

feel that we were doing the best we can to try and reduce risk.

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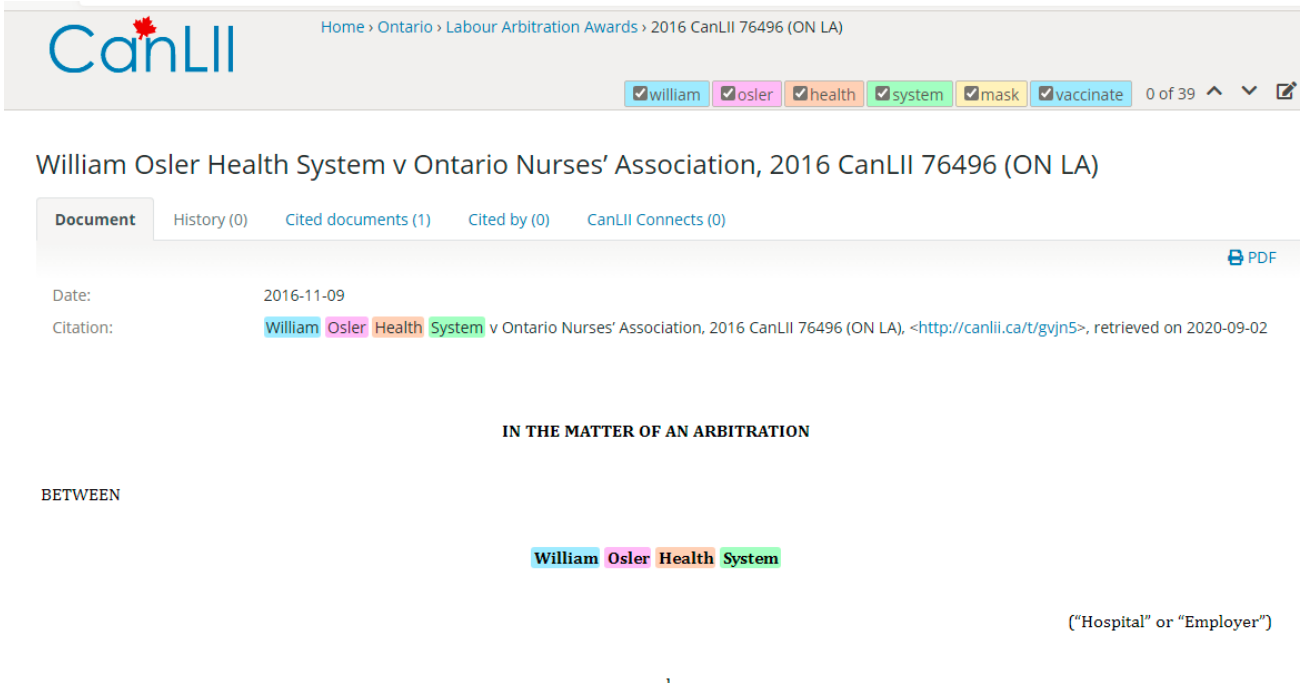
I tried to be quite clear in my report that ***the evidence to support masking is not as great and it is certainly not as good a measure***

Bonnie Henry admits no strong evidence to support maskings.

3. William Osler Health System (2016)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William Osler Health System v Ontario Nurses' Association, 2016 CanLII 76496 (ON LA)

Document History (0) Cited documents (1) Cited by (0) CanLII Connects (0)

PDF

Date: 2016-11-09

Citation: William Osler Health System v Ontario Nurses' Association, 2016 CanLII 76496 (ON LA), <http://canlii.ca/t/gvjn5>, retrieved on 2020-09-02

IN THE MATTER OF AN ARBITRATION

BETWEEN

William Osler Health System

("Hospital" or "Employer")

2016.william.osler.health.system.ruling

2. The primary issue dividing ONA and the hospitals was ***the controversial 'vaccination or mask' policy ("VOM policy") adopted by many hospitals. The question proceeded to arbitration by test case leading to the decision in Sault Area Hospital, 2015 CanLII 55643 (ON LA)***. Following an exhaustive review of the available medical scientific literature and having heard from a number of expert witnesses, I determined that:

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Absent adequate support for the freestanding patient safety purpose alleged, I ***conclude that the Policy operates to coerce influenza immunization and, thereby,***

undermines the collective agreement right of employees to refuse vaccination. On all of the evidence, and for the reasons canvassed at length in this Award, I conclude that the VOM Policy is unreasonable. (at para. 13)

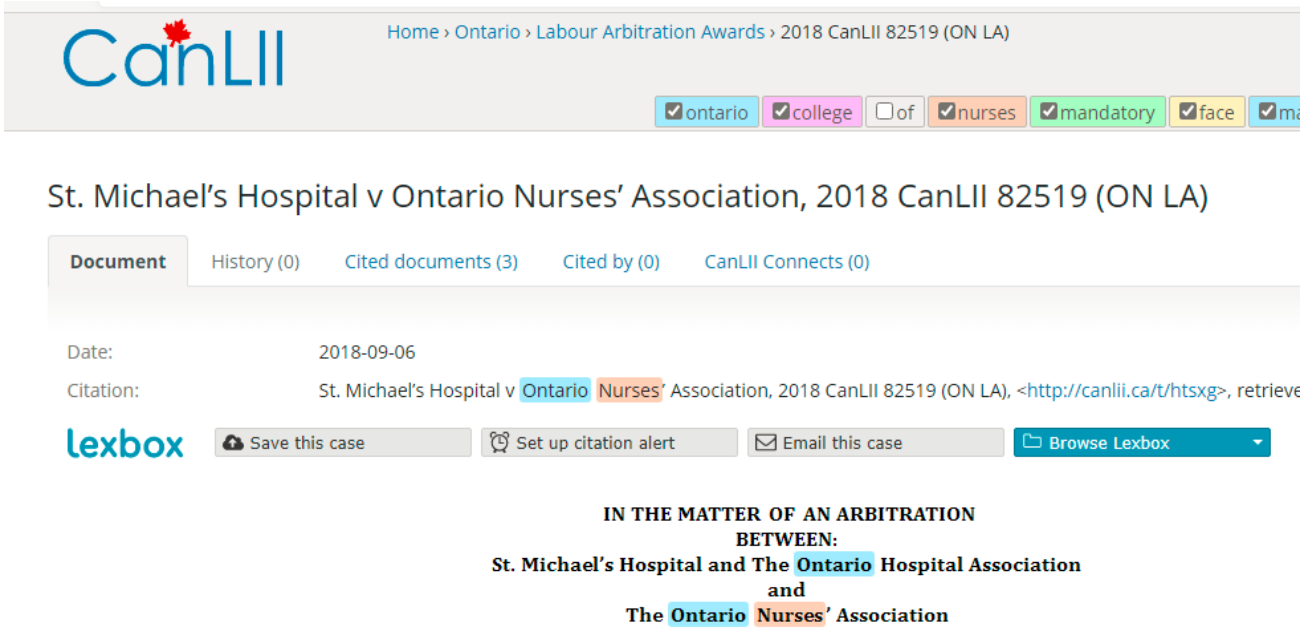
12. Insofar as the First Issue is concerned, ***I do not agree that the recommendation to wear a mask for the duration of the influenza season in any patient area of the Hospital is sustainable***. I found at para. 319 of Sault Area Hospital that there was "scant scientific evidence of the use of masks in reducing the transmission of influenza virus to patients". In the absence of further evidence to the contrary, ***I conclude that there is no reasonable basis for the recommendation and that it should be deleted from the Policy***.

13. Insofar as the Second Issue is concerned, I am satisfied that a blend of the Hospital and Union proposals is preferable to either of them standing alone.

14. The Union accurately summarizes the evidence heard in Sault Area Hospital about the typical length of the influenza incubation period before the onset of symptoms. Nevertheless, I am reluctant to designate a specific number of hours; the length of time will almost certainly vary with individual circumstances. The Hospital's written submission states that: "We have chosen with our proposed language to have individual assessments made by Infection Control Practitioners at the Hospital." On the assumption that those assessments will be made available and conducted very close to the 72-hour mark, I find the Hospital's approach to be acceptable. I also find that the Union's alternative suggestion to the 'patient care area' question to be appropriate.

Just as with the Sault Area Hospital case, this "vaccinate or mask" policy was found to be unreasonable, an unsupported by hard evidence.

4. St. Michael's Hospital (2018)



2018.ontario.nurses.association.mask.ruling

Introduction

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Summarily stated, this case concerns the ***reasonableness of the Vaccinate or Mask Policy (hereafter "VOM policy") that was introduced at St. Michael's Hospital*** (hereafter "St. Michael's") in 2014 for the 2014-2015 flu season and which has been in place ever since. Under the VOM policy, Health Care Workers and that group, of course, includes nurses (hereafter "HCWs"), ***who have not received the annual influenza vaccine, must, during all or most of the flu season, wear a surgical or procedural mask in areas where patients are present and/or patient care*** is delivered.

St. Michael's is one of a very small number of Ontario hospitals with a VOM policy: ***less than 10% of approximately 165 hospitals***. The Ontario Nurses' Association (hereafter "the Association") immediately grieved the VOM policy in every hospital where it was introduced. It should be noted at the outset that the VOM policy has nothing to do with influenza outbreaks that are governed by an entirely different protocol, and one that is not at issue in this case.

This is not the first Ontario grievance taking issue with the VOM policy. The parties appropriately recognized that the matters in dispute were best decided through a lead

case rather than through multiple proceedings at the minority of hospitals where the policy was in place. ***Accordingly, the Association grievance at the Sault Area Hospital was designated as that lead case and proceeded to a lengthy hearing before arbitrator James K.A. Hayes beginning in October 2014 and ending in July 2015. Arbitrator Hayes heard multiple days of evidence (replicated to some extent in this proceeding) and issued his decision, discussed further below, on September 8, 2015 (hereafter "the Hayes Award")***. Arbitrator Hayes found that the Sault Area Hospital's VOM policy was inconsistent with the collective agreement and unreasonable. The grievance was, accordingly, upheld.

Conclusion

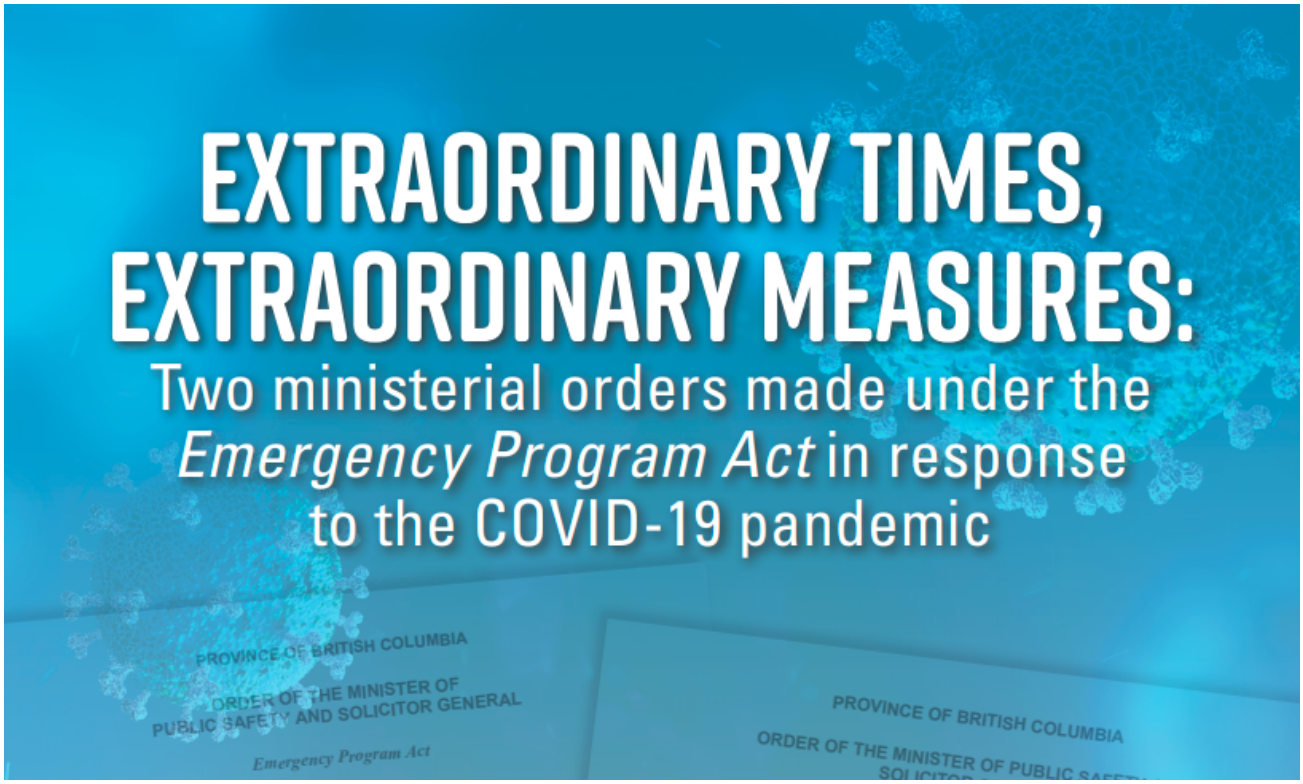
.

It was noted at the outset that this case was, in large measure, a repeat of the one put before Arbitrator Hayes. It is not, therefore, surprising that there is an identical outcome. ***Ultimately, I agree with Arbitrator Hayes: "There is scant scientific evidence concerning asymptomatic transmission, and, also, scant scientific evidence of the use of masks in reducing the transmission of the virus to patients"*** (at para. 329). To be sure, there is another authority on point, and the decision in that case deserves respect. But it was a different case with a completely different evidentiary focus. It is not a result that can be followed.

One day, an influenza vaccine like MMR may be developed, one that is close to 100% effective. To paraphrase Dr. Gardam, if a better vaccine and more robust literature about influenza-specific patient outcomes were available, the entire matter might be appropriately revisited. ***For the time being, however, the case for the VOM policy fails and the grievances allowed. I find St. Michael's VOM policy contrary to the collective agreement and unreasonable. St. Michael's is required, immediately, to rescind its VOM policy***. I remain seized with respect to the implementation of this award.

The Sault Area Hospital case had largely set the precedent, and the issues were were virtually identical. Another hospital was forced to scrap its "vaccinate or mask" policy.

5. BC Ombudsman's June 2020 Report


EXTRAORDINARY TIMES,
EXTRAORDINARY MEASURES:
Two ministerial orders made under the
Emergency Program Act in response
to the COVID-19 pandemic
PROVINCE OF BRITISH COLUMBIA
ORDER OF THE MINISTER OF
PUBLIC SAFETY AND SOLICITOR GENERAL
Emergency Program Act
PROVINCE OF BRITISH COLUMBIA
ORDER OF THE MINISTER OF PUBLIC

2020.BC.ombudsman.report.2.orders.overreach

Conclusion: ***The Ministerial Orders Are Contrary to Law Based on the above analysis of the orders and the Emergency Program Act***, I have concluded that to the extent that they purport to suspend or amend the provisions of statutes, ***Ministerial Orders M098 and M139 are contrary to law because they are not authorized by the governing legislation, the Emergency Program Act. Many of the orders made by the minister have been in place for more than two months***. In my view, it is incumbent on government to seek an appropriate solution to this problem of invalidity that minimizes any negative impacts to the public. In this respect, I note that Ministerial Order M192, the order replacing M139, continues to purport to suspend and amend statutory requirements that apply to local governments.

The Exercise of Ministerial Discretion The Supreme Court of Canada has made clear that just as there are limits on what statutory powers can be exercised under a statute, ***there are also limits on how those powers can be exercised: . . . there is no such thing as absolute and untrammeled "discretion,"*** that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose . . . regardless of the nature or purpose of

> the statute

The BC Ombudsman found that 2 Ministerial Orders were actually illegal, and far exceeeded the discretion which they were allowed to use.

6. These Rulings Are Very Encouraging

The 2015 and 2018 rulings are important, as they are 2 precedents in a quasi-judicial body, that found mask wearing to be of very limited value. It's even better (from a B.C. perspective), that Bonnie Henry is on record saying that there is little evidence that masks work.

The B.C. Ombudsman's Report is also helpful. Although not binding on a court, those opinions do carry some weight. And 2 orders have already been found to be illegal.

Sault Area Hospital and Ontario Nurses' Association, 2015 CanLII 55643 (ON LA)
https://www.canlii.org/en/on/onla/doc/2015/2015canlii62106/2015canlii62106.pdf
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William Osler Health System, 2016 CanLII 76496 (ON LA)
https://www.canlii.org/en/on/onla/doc/2016/2016canlii76496/2016canlii76496.pdf
2016.william.osler.health.system.ruling

St. Michael's Hospital v Ontario Nurses' Association, 2018 CanLII 82519 (ON LA)
https://www.canlii.org/en/on/onla/doc/2018/2018canlii82519/2018canlii82519.pdf
2018.ontario.nurses.association.mask.ruling

BC Ombudsman's June 2020 Report
https://bcombudsperson.ca/assets/media/ExtraordinaryTimesMeasures_Final-Report.pdf
2020.BC.ombudsman.report.2.orders.overreach

CANADIAN DECISIONS, DRUGS/ALCOHOL, HEALTH, PRIVACY, VACCINES